IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 7-12-2006

CORAM

THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

S.A.No.1208 of 2006
and
M.P.No.1 of 2006

Senbagasundari .. Appellant/Defendant

vs

Kothandapillai .. Respondent/Plaintiff

Second appeal preferred under Sec.100 of the Code of Civil Procedure against the judgment and decree of the Subordinate Judge, Ranipettai, in A.S.No.55 of 2005 dated 20.9.2006 reversing the judgment and decree of the District Munsif, Arakkonam, in O.S.No.288 of 2004 dated 11.1.2005.

For Appellant : Mr.V.Raghavachari

For Respondent : Mr.S.Natanarajan

JUDGMENT

The defendant whose defence though accepted by the trial court in a suit for specific performance, on being negatived by the first appellate forum, has brought forth this second appeal.

2.The respondent/plaintiff filed O.S.No.288 of 2004 on the file of the District Munsif, Arakkonam, seeking the relief of specific performance on the basis of Ex.A1 agreement dated 12.9.1988, alleging that the plaint Schedule mentioned property belonged to the defendant; that an agreement was entered into between the parties; that the defendant agreed to sell the same in consideration of Rs.78,110/-; that on the date of the agreement namely 12.9.1988, an advance of Rs.20,000/- was paid; that only a xerox copy of the agreement was handed over to the plaintiff; that the time within which the balance of consideration should be paid and sale deed should be executed, was stipulated in the agreement itself; that a sum of Rs.15,000/- was paid on 7.1.1989; that on 9.3.1989, another sum of Rs.10,000/- was paid; that a sum of Rs.6,000/- was also paid on 28.5.1989; that on receipt of the same, the defendant has made endorsements on the back of the agreement; that on 25.3.1989, the defendant has received Rs.19,000/- and executed a receipt in that regard; that as could be seen from the receipt, the plaintiff has paid Rs.70,000/-; that apart from that, the plaintiff has already

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paid Rs.1,000/-, and thus, the balance was only Rs.7,110/-; that the plaintiff made many a demand for the execution of the sale deed by receiving the balance of consideration; but, the defendant was evading; that the plaintiff was also put in possession of the property pursuant to the agreement; that under the circumstances, it is a case where Sec.53A of the Transfer of Property Act has got its application, since the agreement has been partly performed; that subsequent to the agreement, the plaintiff has not paid any waram to the defendant; that the plaintiff issued a notice on 23.3.1996; that in order to show his possession, documents have been filed; that on receipt of the said notice, the defendant has issued a reply notice containing false allegations; that under the circumstances, the plaintiff was compelled to file the suit for specific performance, and hence, it is filed.

3.The suit was resisted by the defendant inter alia stating that it is true that there was an agreement for sale on 12.9.1988; that the consideration was fixed at Rs.78,110/-, out of which an advance of Rs.20,000/- was paid on that day itself; that the description of property found in the plaint schedule, and the description of property found in the agreement, are inconsistent; that there was time stipulated; but, the plaintiff did not make the payment of the balance of consideration, since he had not sufficient funds; that under the circumstances, the plaintiff cannot seek the enforcement of the agreement; that after the agreement was entered into between the parties, the plaintiff was to pay Rs.51,000/-; that even now, the plaintiff was to pay Rs.7,110/-; that in the agreement filed, there are corrections made, apart from the receipt filed and relied on by the plaintiff; that the suit receipt was actually one fabricated by the plaintiff; that the plaintiff has not come to the Court with clean hands; that the suit is barred by limitation; that the plaintiff should have filed the suit in the year 1992 itself; that apart from that, the defendant is in possession of the property, and hence, the suit must be dismissed.

4.The trial Court framed necessary issues, tried the suit and dismissed the same. The aggrieved plaintiff took it on appeal. On enquiry, the first appellate Court allowed the appeal by setting aside the judgment of the trial Court and granted the relief of specific performance. Aggrieved, the defendant has filed the second appeal before this Court.

5.After hearing the Counsel, the following substantial questions of law were formulated for consideration:

(1) Whether the lower appellate Court is justified in decreeing the suit for specific performance when the plaintiff had failed to establish continuous readiness and willingness to adhere to the agreement?

(2) Whether the suit for specific performance could be decreed when the plaintiff had moved the Court nearly after 8 years of the agreement and whether the Courts below ought not to have held that the suit is hopelessly barred by limitation?

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(3) Whether the plaintiff is entitled to seek for decree of specific performance when he had pleaded a false case of part performance?
(4) Whether the finding of the lower appellate Court is not against the evidence of PW1, Exs.A1 to A3 and the plaint pleadings and whether its finding is not against the very evidence adduced by the plaintiff?
(5) When the value of the property had escalated substantially and the fault in execution of the agreement lies with the plaintiff, is the lower appellate Court justified in decreeing the suit for specific performance?
(6) When the plaintiff had pleaded a false case even as to quantum of payment made and did not explain the non production of the original of Ex.A1, whether the Court below is justified in allowing the appeal?
(7) Whether the xerox copy of the document under Ex.A1 is admissible in evidence in the absence of any explanation for non production of the original?
(8) Whether the lower appellate Court is justified in accepting the version of the plaintiff that the original is with the defendant, when the same had not been set out in the notice under Ex.A19 and whether such a reasoning is not knave, unnatural and artificial?
(9) Whether the lower appellate Court is justified in comparing the signatures in Ex.A1 (xerox copy) with the documents under Exs.B5 to B7 contrary to the settled principles of law laid down by the Courts of law?
(10) Whether the suit as framed is not maintainable and is not bad for multifariousness?

6.At that time, both the Counsel would submit that they are prepared to argue the appeal, and thus, the appeal is heard and disposed of by this Court with the following judgment.

7.It was a suit for specific performance filed by the plaintiff alleging that there was an agreement entered into between the parties on 12.9.1988 in respect of a landed property wherein the consideration was fixed at Rs.78,110/-. The original agreement was not filed before the Court, and only a xerox copy of the same was filed by the plaintiff. Out of the sale consideration of Rs.78,110/-, an advance of Rs.20,000/- was paid by the plaintiff and received by the defendant on that day.

8.It was contended by the plaintiff's side that out of the sale consideration, Rs.20,000/- was paid on the very day; that on 7.1.89, Rs.15,000/- was paid; that on 9.3.1989 Rs.10,000/- was paid; that on 28.5.1989, a sum of Rs.6,000/- was paid; that subsequently, on 25.3.1989, a sum of Rs.19,000/- was paid; that he has also paid Rs.6,000/-; that the receipt was also executed under Ex.A4 incorporating the earlier payments, and thus, the balance was only Rs.7,110/-; that the plaintiff made many a demand; but, the defendant was not prepared to execute the sale deed by receiving the balance of consideration, and under the circumstances, the suit was filed after issuing notice to the defendant.

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9.The main contention put forth by the defendant's side was that out of the sale consideration of Rs.78,110/-, only Rs.20,000/- was paid on the very day as advance, which is incorporated in the document; that it is true that Rs.15,000/-, Rs.10,000/- and Rs.6,000/- were paid on 7.1.89, 9.3.89 and 28.5.89 respectively, and thus, the total payment made by the plaintiff, is to the tune of Rs.51,000/-; that the rest of the amount was not made; that Ex.A4 document was a fabricated one; that the plaintiff without making payment of the remainder, has brought forth this suit; that even in the earlier notice issued, Ex.A4, the receipt, has not been referred to; that apart from this, the suit has been brought forth after a period of 7 or 8 years; that there is no explanation tendered; that the plaint lacks in pleading; that apart from that, in the instant case, the plaintiff has not come with clean hands, and hence, no relief could be granted.

10.After careful consideration of the rival submissions made and scrutiny of the materials available, this Court is of the considered opinion that it is not a fit case where the relief of specific performance could be granted. In the instant case, it is noticed by the Court that the relief cannot be granted on grounds more than one. Needless to say that the grant of specific performance is a discretionary relief. In the instant case, the sale consideration as found in the document, is Rs.78,110/-. Out of the sale consideration, according to the plaintiff, Rs.71,000/- has been paid, and the balance of Rs.7,110/- was payable by him. Though it is denied by the defendant, in the written statement, she has specifically averred that the balance is only Rs.7,110/-. In such circumstances, so far as the payment of consideration, as put forth by the plaintiff, is concerned, the same need not be found to be a different one. Now, what are all required to be stated is that whether the plaintiff has acted in accordance with the agreement entered into between the parties as found under Ex.A1. Admittedly, the plaintiff was in possession of the property and cultivating the same by paying waram. The case of the plaintiff is that from the time of entering into the agreement, he need not pay waram thereafter, since the lease agreement between the parties has come to an end by the sale agreement entered into between them. It would be apt and appropriate to reproduce the clause in the agreement as follows:

> "தை மாதம் 30ம் தேதிக்குள் மீதி கிரய தொகையை செலுத்தி உங்கள் சொந்த சிலவில் கிரய பத்திரம் செய்து கொள்ளவேண்டியது. தவறும் பட்சத்தில் தங்கள் ரிஜிஸ்தார் செய்யும் காலம் வரை நிலங்களில் பயிர் செய்யும் தானியங்கள் எதுவாகிலும் குத்தகை கொடுத்து வந்த மாதிரி கொடுத்து வரவேண்டியது."

11.From the above, it could be seen that it is a case where the time is stipulated in the contract. The agreement was entered into in the year 1988, and Thai what was referred to in the document, would come in February 1989. While the time is stipulated, it would go on to show that if the payment of balance of consideration is not made within February 1989, then at the expenses of the plaintiff he should continue to pay waram as he was paying in the past. It is an

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admitted position that at the time of the filing of the suit or thereafter, no waram has been paid. The learned Counsel for the respondent/plaintiff would submit that the major part of the amount has been paid even in March 1989 itself, and therefore, there was no need for making the waram thereafter, which in the opinion of this Court, cannot be countenanced. Therefore, the strict compliance of the agreement was not done by the plaintiff.

12.Secondly, in a case like this, where the relief of specific performance on the basis of an agreement for sale is sought for, the law requires that the readiness and willingness on the part of the plaintiff must be specifically pleaded. If not pleaded in the plaint, it could be well termed as lack of pleading, which would be suffice to refuse the relief. The contention put forth by the learned Counsel for the respondent that it has been well stated in the notice; that the notice would also form part of the pleading, and hence, it has got to be taken so cannot be countenanced. It is well settled proposition of law that in a given case like this, where the plaintiff seeks a relief of specific performance and if not the readiness and willingness of the plaintiff is specifically pleaded, it is lacking in pleading. Therefore, the Court has to necessarily refuse the relief. Even the averment in the notice either, or the subsequent evidence before the Court cannot cure the same. In the absence of such pleading, it is a thing which could be inferred. Hence, in view of the fact that the pleading as to the readiness and willingness lacks in plaint, the plaintiff cannot be given the relief.

13.Apart from the above, in the instant case, added circumstance is that the plaintiff is unable to give any reason why there was an undue delay in filing the suit. According to the plaintiff's Counsel, though the agreement was entered into in September 1988, the major part of the payment was made in the year 1989 itself, and further in a case of specific performance for the execution of the sale deed in respect of an immovable property, law of limitation would run, and the suit should be filed within three years from the time of the refusal of the demand, and in the instant case, many a demand was made; but, there was only evasion on the part of the defendant. This Court is of the considered opinion that in the instant case, the suit has been filed only in the year 1996, and the time for payment made under the agreement Ex.A1, is within February 1989; but, the suit has been filed after a long lapse of nearly 7 years. The plaintiff's explanation that major part is paid, and hence, he has filed the suit now, cannot be said to be any laches on his part. But, at this juncture, the Court has to again point out that the plaintiff can well say that the suit was also filed in time provided he has made the payment of waram as usual as found in the agreement, but has not done so also. Having failed to pay the waram as found in the agreement also, this Court is of the view that it was a breach of the Clause as found in the agreement. Having breached such a clause, which is found in the agreement and which casts a duty on him and that too, when the plaintiff is in possession of the property, it can be well stated that it is not a fit case which would warrant for granting the relief of specific

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performance, a discretionary one. Hence, the judgment of the first appellate Court has got to be set aside.

14.In the result, this second appeal is allowed setting aside the judgment and decree of the first appellate Court and leaving the parties to bear their costs. Consequently, connected MP is closed.

Sd/
Asst.Registrar

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Sub Asst.Registrar

To:

1.The Subordinate Judge
Ranipettai

2.The District Munsif
Arakkonam

+ 1 cc to Mr. V. Raghavachari, Advocate SR No. 60769

+ 1 cc to Mr. S. Natarajan, Advocate SR No. 60719

nsv/

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